



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CIVIL CASE NO. 15 OF 2020

GARDEN HOTEL
LIMITED.....PLAINTIFF

VERSUS

**ELIZABETH NGII MAINGI, ROY MAKOMA MAINGI &
DERRICK MUTWII MAINGI (*as the legal representatives
of the estate of Laban Maingi Kitele -deceased*)
.....DEFENDANT**

RULING

1. This ruling is in respect of a notice of motion dated 26 May 2025, filed by the plaintiff, and it is presented as being made under **Sections 3A** and **80** of the **Civil Procedure Act**, **Order 45 Rules 1, 2 and 3** and **Order 51, Rule 1** of the **Civil Procedure Act**, and it seeks the following reliefs from this court: -

a) Spent.

b) Spent.

c) THAT, this Honourable court be pleased to review, vary and/or set aside its ruling delivered on the 11 March, 2025.

d) THAT the costs of this application be provided for.

2. The motion is supported by the grounds set out in the body thereof and the supporting affidavit of Oscar Ndambuki, sworn on the instant date. In brief, he states that, in its ruling of 11 March 2025, this honourable court struck out the plaintiff's application because, at the time of its filing, **M/S. Mbugua Mureithi & Co. Advocates** was still listed as the law firm on record, and the firm of **B.M Mung'ata & Co. Advocates** had not yet filed a notice of change of advocates as required by **Order 9 Rule 5** of the **Civil Procedure Rules**.
3. Additionally, the court based its decision on technicalities related to the timing of filing the notice of change of advocates and the notice of motion, which led to the application being found incompetent. The grounds for this application arise from an error that is clear on the face of the record, as well as other

sufficient reasons that may persuade the court to review or set aside its ruling. The error is that the court did not note that the plaintiff had attached to his supporting affidavit a consent, which clearly states that the firm of **B.M Mung'ata & Co. Advocates** shall take over the conduct of this matter from that of **Mbugua Mureithi & Co. Advocates** and shall be on record henceforth on behalf of Garden Hotel Limited. Further, the plaintiff has now obtained the cause list from his former advocate, Mr. Owele, to show the court that he was unable to attend court on 18 October 2023 due to a busy court schedule.

4. This motion is strenuously challenged by the replying affidavit of Elizabeth Ngii Maingi, one of the administrators of the deceased's estate, deposed on 9 June 2025, where in summary, she informs the court that even though the court found the plaintiff's motion to be incompetent, it still considered the case on its merits and decided that the plaintiff had not shown enough reason to set aside the *ex parte* orders issued on 18 October 2023. There is no clear error in the record, or has any new and important evidence been found to justify a review of the ruling dated 11 March 2025, as required by **Order 45 Rule 1** of the **Civil Procedure Rules**. This motion simply tries to revisit issues the court has already decided and does not meet the strict requirements for a review.

5. When the matter was brought before this court for hearing, and upon court directions, the motion was argued through a written submission filed by **M/s. B.M Mung'ata & Co. Advocates** for the plaintiff, dated 17 December 2025 and **Ms. Manthi Masika & Co. Advocates** dated 19 January 2026 for the defendant, dated 29 January 2026. The latter submissions failed to adhere to strict page limit directives and submitted extensive arguments. Without unnecessary elaboration, and guided by the Supreme Court of Kenya's decision in **Okoiti & 3 others v Cabinet Secretary for the National Treasury and Planning & 10 others [2023] KESC 69 (KLR)**, this court hereby strikes out these submissions.
6. Accordingly, after thoroughly examining the motion, including its grounds and affidavits by parties, plaintiff's submissions, together with the provisions of law and judicial precedents relied upon, which shall be taken into consideration in the analysis and determination of this matter, the sole issue for determination is **whether the motion meets the legal threshold for review of the orders issued in the impugned ruling**. We shall now proceed.
7. With respect to this issue, the relevant provisions governing the review of court decisions are set out in **Section 80** of the **Civil Procedure Act** and **Order 45, Rule 1** of the **Civil Procedure Rules**. **Section 80** states that;

“Any person who considers himself aggrieved-(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

8. Further, **Order 45 Rule 1 (1)** of the **Civil Procedure Rules** provides as follows: -

“(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the

order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

9. The salient conditions brought out in **Order 45 Rule 1 (1)** of the **Civil Procedure Rules**, such as the discovery of new and important matter, mistake, and sufficient cause, have to be proved by an applicant, and in dealing with such applications, the court has to exercise its judicious discretion. With regard to prevailing jurisprudence on these provisions, this court aligns itself with **paragraph 32** of the Supreme Court’s decision in **Parliamentary Service Commission v. Wambora & 36 others [2018] KESC 74 (KLR)**, in which it articulated the following non-exhaustive guiding principles for the consideration of applications for review of court decisions:

“(i)A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court. (ii)Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the

Court;(iii)An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application. (iv)In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically. (v)During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review. (vi)The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:(a)as a result a wrong decision was arrived at; or(b)it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”

10. In the Court of Appeal decision of **NATIONAL BANK OF KENYA LIMITED vs NDUNGU NJAU [1997] KECA 389 (KLR)** that was relied upon by the plaintiff, the court stated as follows on the guiding principles:-

“On an application for review, it is particularly necessary that the application should disclose in

the body of the notice of motion the ground or grounds on which the review is being sought.....

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

11. In the present case, guided by **NATIONAL BANK (Supra)**, which held that an application for review should disclose in the body the grounds on which the review is sought, the plaintiff has proffered two grounds for review, namely that there is an apparent error on the face of the record and sufficient cause, as the court based its decision on technicalities related to the timing of filing the notice of change of advocates and the notice of motion, and additionally, did not consider a consent between the erstwhile and incoming counsel for the plaintiff. Importantly, this consent has never been adopted as an order of the court or has.

12. Having considered these grounds, this court concludes that none have satisfied the legal threshold and agrees with the defendant's replying affidavit, as will be demonstrated shortly. In the impugned ruling, the court addressed two issues: first, whether at the time of filing the motion, the law firm of B.M. Mung'ata & Co. Advocates was properly on record; and second, whether the plaintiff had met the threshold to warrant the setting aside of the orders issued on 13 October 2023.
13. Regarding the first issue, the court examined **Order 9 Rule 5** of the **Civil Procedure Rules**, which pertains to the procedure for changing advocates during proceedings. In the impugned ruling, the court did not dwell on the plaintiff's consent, as such consent is not contemplated by **Order 9 Rule 5** of the **Civil Procedure Rules**. The plaintiff has questioned this court's failure to consider such consent, effectively asserting that the court misconstrued **Order 9 Rule 5** of the **Civil Procedure Rules**.
14. Respectfully, this constitutes a valid ground for appeal and not review, as established by numerous judicial authorities, including the case of **NATIONAL BANK (Supra)**. A similar finding is made on the plaintiff's ground that the court anchored its decision on technicalities, in its appreciation of **Order 9 Rule 5** of the **Civil Procedure Rules**. In other words, the plaintiff is asserting that the court misapprehended **Article 159** of the **Constitution of Kenya**. Pointedly, it

appears that the plaintiff overlooked the fact that the court also duly considered the motion on its merits.

15. Consequently, in the end, guided by the law and judicial precedents, for the reasons and findings set out above, this court finds that the notice of motion dated 26 May 2025 is not merited. It is dismissed, with costs in the cause. As this is a matter in which the hearing is concluded, the parties are directed to exchange written submissions within 30 days. A mention date shall be given before **Hon. Lady Justice A. Nyukuri** for the purpose of issuing a judgment date.

Orders accordingly.

Delivered and Dated at Machakos this 21st day of April, 2026.

**HON. A. Y. KOROSS
JUDGE
21.04.2026**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms. Kanja Court Assistant

No appearance for parties

ORIGINAL